



POLICE DEPARTMENT

September 15, 2010

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Raymond Fuscaldo
Tax Registry No. 917649
75 Precinct
Disciplinary Case No. 85820/09

The above-named member of the Department appeared before me on May 14, 2010, and June 9, 2010, charged with the following:

1. Said Police Officer Raymond Fuscaldo, assigned to the 75th Precinct, while on duty, at about 2330 hours on May 30, 2008, at Schenck Avenue between Sutter Avenue and Blake Avenue, Kings County, did engage in conduct prejudicial to the good order, efficiency and discipline of the Department, to wit: While Akhtob Gordon was on the ground in handcuffs, Respondent approached Mr. Gordon and kicked him in the head.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT-PROHIBITED CONDUCT
GENERAL REGULATIONS

The Department was represented by Nancy Lichtenstein, Esq., Department Advocate's Office, and Respondent was represented by John P. Tynan, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Guilty as charged.

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SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Akhtob Gordon, Police Officer Antonio Santana, and Police Officer Radoslaw Terepka as witnesses.

Akhtob Gordon

Gordon is a senior at [REDACTED] and after school he is a mentor for kids in elementary school. As a mentor he helps students with their homework. He has been doing this for three years. He is now 18 years old.

On Friday, May 30, 2008 at about 11:00 p.m. he was with friends on the corner of Van Sicken and Sutter. They were trying to contact one of his friends to go to his house when they saw a black car approach. Gordon described it as an "all black Crown Vic." He was unable to see into the car. He said as the car approached he did not know what to do, he became nervous and started to walk off, stating, "I was about to take off."

Explaining why he wanted to take off, Gordon said:

Because well, in the east, East New York, I don't live over there and my cousins and them they tell me different things like how they have to be careful so as the car approaching and I don't see nobody in it I am not taking any chances with my life so I took off.

Gordon testified that he ran to Miller Avenue and turned left. He stopped on Schenck Avenue between Sutter Avenue and Blake Avenue. He stopped running, he said, because the cops had his building blocked off. He realized that police officers were chasing him from the "guy who was running with him" who was, he believed, the

arresting officer. Clarifying when he first realized they were police, Gordon stated:

The car I wasn't sure if that was the cops or not but when I realized it it was a whole bunch, it was a whole lot of blue and white cars . . . that is when I know. Once I knew I was around that I felt relieved but at the same point I could not stop running because of the fact there was nobody around where I was-going to stop at and I didn't want nothing to happen to me so when I see there is a bunch of people in front of my aunt's crib. I am sorry, in front of my aunt's house, I stopped.

After he stopped, he put his hands up and got on the ground. He said: "As I was going to the ground the officer picks me up and then he throws me on the ground and then everything was just like rough." When asked what happened after the officer tackled him to the ground, Gordon said:

I know I was trying to tell him all my stuff all over the floor I was trying to tell my cousin to get it then they wouldn't let him get it but then I realized the officer walking to me like I didn't really think nothing of it I just thought he was about to pick me up in order to take me away, that is when I felt the kick. I turned my head this way because I didn't think nothing of it and I felt the kick to the back of my head right here.

Gordon explained that it was the second police officer who came on the scene who kicked him in the rear portion of the right side of his head. Gordon said he felt dizzy and weak when he got to the station house. On Sunday afternoon he appeared before a judge and was given an ACD (adjournment in contemplation of dismissal). After that he went straight to the hospital with his mother. He was given a CAT scan and was told he had a slight concussion. His mother filed a lawsuit which was settled for \$100,000. Gordon further explained that before the second officer came on the scene both his hands had been handcuffed.

On cross-examination, Gordon said that when he first saw the car he was with two other people. He agreed there was a store on the corner, a grocery or deli, which he believed was closed at the time. He agreed that the car was a "Crown Vic" and that when he saw the car coming he did not want to have contact. He said that after the incident he was put in the car and that the windows were up. He said the officer who was chasing him was a short, White cop but added, "I don't know if he was White or Black. I think he was Spanish to be honest." He further clarified that the officer who was running with him was not Black but White or Hispanic.

Gordon said he was not familiar with the neighborhood. He had been there before but he estimated he had been there less than ten times. He said he did not know that the car contained police officers because no one runs from the cops; if they do, they might get shot. He said, "I did not know it was cops. If I knew it was the cops I would not have ran." He explained that the car was an all-black car and he did not know it contained the police.

He ran because there is a lot of black-on-black crime, noting: "It doesn't have to be the cops that is ready to shoot it could be somebody else, a friend, it could be anybody." He added that it could be a friend and that you cannot trust anybody. Gordon said that at the time of the incident he had a phone in his hand. He did not throw the phone away and he had it at the precinct. He said the phone was a "black jack," black in color with a key pad. He said it was probably a little bigger than a cassette tape but thinner. He did not recall if he ran with the phone in his hand or if he put it away. He did not recall seeing anyone get out of the car. He did not recall seeing the windows rolled

down. He did not know if the car came to a complete stop because he had started running when the car started "creeping by."

He did not know if his friends started running. He did not recall the car flashing its lights. There was no loud music coming from the car. They did not hit their horn. They were not yelling things out of the car. He said he ran up Miller, ran up past Sutter, made a left on Miller and another left on Blake, then went straight to Schenck. He said he was not running back to where he started from. He explained that he started on Sutter and Van Siclen and ended at Schenck and Blake, so he was not where he started. He said he was not confused; he was going to his aunt's house. He did not hear gunshots while he was running nor did he hear the police yell for him to stop. He said he stopped when he saw marked police cars. He did not seek help from the police; he was going to his aunt's house. He was not sure how far the police were from his aunt's house. He said he was not going to the cops for help, stating, "Cops don't help you over there...I am scared of cops over there..." Gordon said he had never been arrested before. He had never before been beaten up by the police. He did not ask for medical treatment at Central Booking.

He knew someone was chasing him but he did not know if it was someone from the car, saying, "There is a whole bunch of stuff going on. It could be somebody from anywhere." Gordon said he felt relieved at some point because he thought he was going to get shot. Gordon said he had a friend who had been shot at by the police.

Gordon said the man chasing him had a dog tag on a chain around his neck. He said that the dog tag made him realize the guy was a cop and that is why he took a chance and stopped. When he stopped that officer immediately tackled him. He said he was on

his way down when the guy picked him up and threw him down. Gordon said he is between 5 feet, 6 or 8 inches tall and weighs about 160, 170 pounds. Gordon said he was shorter at the time of the incident as he was 16 at the time and he is 18 now. He also said he weighed less then. He said he was held during the tackle by his clothes. He was lifted up from the ground by his hair. Gordon said it was less than a second from the time he hit the ground to the time handcuffs were on him. He said he was then kicked. Gordon said he moved his head before being kicked and noted that if he had not done so he would probably have been kicked in the face. He affirmed that both his hands were handcuffed behind his back at that time. He said he believed the officer who handcuffed him did it by himself without help. Once he was put into the car he realized it was the car he had seen at the beginning of the incident at Van Sicken and Sutter.

Gordon said he was taken to the precinct, but he did not know the number. He said he was dazed at that point. He said he had not been drinking alcohol or using drugs. No one offered him assistance and he did not ask for medical attention. He said he passed out briefly. He said the officer told his friend to move away and let him [Gordon] fall. He said his friend was the only one to hold him up and they pushed him away from him. His friend told the police that he [Gordon] was ill, but they still pulled his friend away.

Gordon agreed that he did not like cops after this incident but said that before the incident, he liked cops, noting that his uncle and all of his friends are cops. He said the problem was with cops in East New York, not cops in his neighborhood. He explained that he is from [REDACTED] in downtown [REDACTED].

The next morning he was at Central Booking. He did not see EMS there but he was asked if he needed medical attention. He did not tell them about passing out because he was afraid that would result in their holding him longer. He was told by a cop that he would be out in a few minutes once at the precinct. He said he could not eat and that people thought he was retarded because he could not speak. He explained, "I couldn't even talk right." He said he had a slight concussion.

Gordon testified that his mother took him to the hospital right after he was released. He stated that he was never asked what day it was and where he was at because his mother was there.

When he went to the hospital he did not tell them that he had lost consciousness because he only answered the questions that were asked and they did not ask. When asked about pain, he mentioned a lump and pain in his back from where the cop had his knee in his back while he was putting him in handcuffs. He said his whole body was sore.

At this point in the proceedings, the medical records were received in evidence on consent as Department's Exhibit (DX) 1.

Gordon agreed that when he went to the hospital he told them he had been beaten by the police. He agreed that he told them he had been arrested for marijuana. He said that is what his mother told him. He said there was a "tampering" charge and a whole lot of things and he was not sure what he was arrested for. He said he went before a judge and spoke to his lawyer. He said his lawyer told him not to say anything and that she would talk to the judge. Gordon said he was then released.

Gordon testified that they shaved his head and gave him a CAT scan. He said he had not seen his medical records. He did not know that they found everything was normal; he said he believed they said he had a concussion. He said that the doctor told him this. He said the doctor also told him he [REDACTED].

He has not seen the officer who kicked him again. He has been back to the precinct only to pick up his cell phone, which was broken.

On redirect examination, the Assistant Department Advocate tried to clear up how tall Gordon was on May 30, 2008. Gordon said, "Like five six, five seven, I don't know, like five six." When asked for an approximate answer, he said, "Like five five, five six." He said he weighed "150, 160 something." He also said when he left the hospital, he was given instructions by the doctor for what to do with a head injury. In addition, he was prescribed medication and when asked for what, he stated, "My head. I guess the [REDACTED] [REDACTED]."

On recross-examination, Gordon was asked if the medication he was prescribed was [REDACTED]. Gordon responded, "No" and indicated that he had to go to the drugstore to get it and he knows that you can buy [REDACTED] anywhere.¹ He did not know how many days he took the [REDACTED], but estimated that he took it every night for a couple of weeks. He said his chief complaints were his back and head.

Police Officer Antonio Santana

Santana has been with the Department for seven years. He had been assigned to the 75 Precinct for seven years and is now in Brooklyn North Narcotics. On May 30,

¹ The hospital records (DX 1) indicate that Gordon was prescribed [REDACTED], which is a prescription dosage.

2008, he was at the 75 Precinct working an 8:00 p.m. by 4:35 a.m. tour. He worked patrol, Anticrime. He was working with Officer Terepka. At about 11:30 p.m. they received a radio call for assistance from either Respondent or Police Officer Pralgo, but he did not remember which one. The call was for an immediate response to Schenck and Sutter or Barbey and Sutter, "one of those locations." He went directly there and observed two males in the parking lot at Barbey and Sutter. He began to chase one of the individuals and when he hopped over a fence and kept running he saw him turn left on Blake Avenue. He saw the man come back around to the point that he was running toward him. Santana said he yelled out, "Police don't move" but he kept running. Santana said he gave chase and tackled him to the ground. He said, "We were struggling on the floor the whole time." He said he tried to handcuff him and only got one hand. Respondent helped him cuff the other hand. He believed Respondent was the only officer to help him cuff Gordon. Santana said that Gordon never stayed still while he was on the ground and he continued moving from side to side and flailing his arms. He and Respondent eventually brought Gordon to his feet.

Gordon was arrested, he said, for tampering with evidence, the evidence being marijuana. The marijuana was found on the ground in the parking lot at Barbey and Sutter. Santana agreed that Gordon was not holding the marijuana when he arrested him. He stated that Gordon reached into his back pocket and threw it on the ground. Santana also stated that two suspects were running toward him at that time.

On cross-examination, Santana indicated that he did not see Respondent kick Gordon while he was being handcuffed. Respondent did use physical force to help restrain Gordon. Santana stated that he was in plain clothes but he had his shield exposed

in front of him and he had shield out when he chased Gordon. He said that during the chase he announced that he was a police officer. He indicated that Gordon kept making turns and he lost sight of him on Blake Avenue. Gordon then came back in a circle toward him. Santana agreed that Gordon resisted before he got him to the ground. Respondent, he said, was in a different car than he was. He noted that Respondent was also in plain clothes. Respondent's partner that night was Pralgo. He said most of the Anticrime cars had tinted windows. He also indicated that at the time he tackled Gordon there were marked cars in the vicinity. A bag of marijuana was recovered and Santana said he vouchered it. He noted that he was the arresting officer, but he did not recall taking Gordon into the station house. He said Gordon did not complain about any physical injury nor did he make any request for medical treatment. He did not see any open cuts or any bruising or contusions that were visible on his face at the scene. He did not complain about the tightness of the handcuffs. He said he told the desk officer that Gordon's condition was apparently normal.

Once Gordon was placed in the holding cell there were no complaints about his physical condition. He indicated that it was common to have EMS look at a prisoner but to his knowledge neither Gordon nor anyone else in the holding cell asked for medical attention for him. Nor did the family ask for medical treatment. He also noted that EMS is stationed at Central Booking. Santana said he was not served with any papers in regard to Gordon's lawsuit.

During further cross-examination, Santana identified a picture he took of Gordon while he was in the holding cell, which was admitted into evidence as Respondent's Exhibit (RX) A.

On questioning by the Court, Santana said that while he was running he saw Gordon reach into his back pocket and throw what turned out to be marijuana and throw it to the ground. He did not see Gordon holding a cell phone. Santana said that asking for medical attention at Central Booking would probably extend the time a prisoner would be held before seeing a judge. He did not know the time at which the picture of Gordon was taken.

On redirect examination, Santana said the marijuana was in a clear, Ziploc bag. It was recovered after Gordon was in handcuffs when they went back to look for it.

Police Officer Radoslaw Terepka

Terepka has been assigned to the 75 Precinct for ten years where he works Anticrime. He works in plain clothes. On May 30, 2008, he was working a 10:30 p.m. to 6:05 a.m. tour. His partner was Santana. At around 11:00 p.m. he received a radio run telling he and his partner that the officers were in pursuit of a suspect. He responded to the location which he believes was Sutter and Schenck. He made a left turn onto Schenck and saw two individuals running toward them. He got out of the vehicle and stopped the individual on the left side. Santana, he believed, was attempting to stop the individual on the right side, who was running toward them as well. He did not have anything to do with apprehending the individual that Santana stopped. Santana wound up across the street from him and he could see a brief struggle. He recalled Santana telling the person to stop resisting.

On cross-examination, he said he was 15 to 20 yards away from where Santana was apprehending his suspect. He did not recall what the lighting conditions were and

conceded that he did not have a clear view of what was going on across the street. He only saw Respondent when he was helping Santana put the individual in the car. He said the period of time between when he saw the individual struggle with Santana to the time he was in handcuffs was very brief. He agreed that he only saw Respondent once the individual was handcuffed. He noted that Santana and the individual went down to the sidewalk and his view was further obstructed by parked cars. He said within a minute he saw Santana with the individual in handcuffs.

Respondent's Case

Respondent testified in his own behalf.

Respondent

Respondent was first employed by the Department on July 18, 1996. After leaving the Police Academy he was assigned to the 75 Precinct in Brooklyn. He is assigned to Anticrime where he worked on May 30, 2008. He described his assignment as trying to assess crime before it happens and to respond to violent crimes. The assessment is done by studying crime patterns, complaints and mostly by observations. He said observation includes things that you see and things you hear, "If you hear gunshots you kind of want to run to that spot where it's coming from." He said his observations are not made at the precinct but are generally made while driving around. He noted he wears plain clothes while working Anticrime.

On May 30, 2008 his tour was, he believed, 10:00 p.m. to 6:30 a.m. His partners were Police Officer David Pralgo and Lieutenant Patrick Steffens. Normally, he said, they work with five officers and a sergeant. He said the officers that night were himself,

Pralgo, Terepka and Santana, with Steffens as the supervisor. The unit had two vehicles that night and Steffens was with him. The two cars were unmarked and so are the rest of the cars of Anticrime. That night, he had a black Mercury Marquis; the other car, he believes, was a black Chevy Impala. At about 11:30 p.m., he was in the vicinity of Schenck Avenue. They were there because it is a high crime area where there have been a lot of shootings and robberies. He said they basically concentrate on the area to let them know there is a lot of police presence.

Respondent stated the two cars had been used for some time in the precinct and he agreed that the cars are relatively noticeable within the precinct. He stated, "The individuals, they actually even know our cars. They have our license plates written down. We stopped a few individuals and they had our plates written down in their wallets. They know what to look for."

On that evening, at about 11:30 p.m. at Schenck Avenue, between Sutter and Blake he noticed three individuals, two standing in the street and one on the sidewalk. This is a residential street. They observed them with open alcohol on the hood of the car that they were standing in front of. He, Pralgo and Steffens exited the vehicle and identified themselves as police officers. As there was a violation of the Administrative Code punishable by a summons, he asked them for their identification and if he could have a word with them. He said his shield was hanging around his neck. Two individuals put their hands on the car, but as he approached the third, he took off running westbound on Schenck Avenue. He did not know where the other Anticrime car was at this time.

As this individual ran off, he gave chase. The individual, he said, was a male Black, 16 or 17 years old. The male had a plastic shopping bag in his hand. As he turned the corner he tossed it off to somebody on the side who was hanging out on the stoop. He out ran Respondent. He thought Steffens was behind him but he was not. Steffens had injured his ankle in the foot pursuit. His partner, Pralgo, was chasing with the vehicle and he observed the car pass and make a turn onto Blake Avenue. He lost sight of him but kept running. At one point, the car cut Gordon off and Gordon actually was running toward him. Respondent told him to stop, but he turned around and started running back the other way.

At some point, Pralgo made a radio transmission to the other vehicle about the pursuit of an individual whom they thought had a possible firearm. He explained that when individuals run, they know who he is and what he is out there for. He continued to chase Gordon and was about a block and a half away. He noted that Gordon had made three left turns and was headed back toward where he started from. When he got up to Schenck Avenue he saw Santana running after Gordon. Santana, he said, is a faster runner than he is. He noted that he is 42 years old and Santana is 26 or 27 years old. When he got halfway up the block he saw Santana struggling with Gordon. He had one handcuff on him and was struggling with Gordon who was on the ground. He was 20 to 30 feet away from them. When he got up to them he knelt down and grabbed Gordon's other arm, placed it behind his back and Gordon was handcuffed. He said this took 15 to 30 seconds, "maybe," to get Gordon handcuffed. He said they struggled "a little bit," noting that, "It's not that easy to place someone in handcuffs who doesn't want to be handcuffed."

Respondent said that he kneeled on the ground next to Gordon and did not kneel on Gordon to restrain him. After Gordon was handcuffed, he was picked up.

He did not have to punch Gordon to maintain control. He did not have to kick or stomp Gordon to get him to cooperate. Prior to getting him into handcuffs he did not have to kick or use his foot to control Gordon. Respondent denied having kicked Gordon. Respondent also testified that once Gordon was brought to his feet he did not make any complaints about his physical condition and he was still struggling with them. He did not see any blood on Gordon.

Respondent stated that Gordon was rear cuffed but he was shaking his shoulders back and forth trying to wiggle out. They took him to the vehicle, patted him down to make sure he did not have any weapons or contraband and then transported him to the 75 Precinct.

Neither Respondent nor Santana accompanied Gordon to the precinct as during the chase, Santana had lost his magazine and Respondent stayed with Santana in an effort to locate it.

On cross-examination, Respondent testified that he first drove up in a black Mercury Grand Marquis. He agreed that the windows were tinted but Respondent stated that the windows were rolled down. He said he observed Gordon with other individuals who were next to a vehicle that had alcohol on it. Respondent stated that as soon as he stepped out of the vehicle and announced that they were police Gordon took off running.

Respondent agreed that during the chase he lost sight of Gordon and that when he saw him with Santana he was on the ground with Gordon and Santana had one handcuff on Gordon. That was when he ran over to Santana to assist with the other handcuff. He

noted that he is six feet tall. Respondent acknowledged that he never saw Gordon with a weapon and he was not investigating him for a violent crime. Respondent believed he was wearing black sneakers that day.

On redirect examination, Respondent indicated that between the point where Gordon started running and the point where he threw the bag there were no other people to hand the bag off to. He noted Gordon ran half a block, and as soon as he turned the corner, he tossed the bag to the first house on the left.

On questioning by the Court, Respondent indicated that he chased Gordon about five and a half blocks. He ran half a block, then a full block, then three blocks east and one block north. When asked whether he was out of breath, he responded, "I was pretty tired, yeah." He denied being frustrated; he was just tired. He also denied taking any frustration out on Gordon and stated his concern was to get him under control. He denied kicking Gordon as Gordon testified to.

On redirect examination, Respondent stated that there were a number of marked vehicles in the area but he was not paying attention to them. To his knowledge, no other officer helped them nor did any other officer punch or kick Gordon.

On further questioning by the Court, Respondent testified that after they handcuffed Gordon they wanted to get him out of the area as a crowd that was gathering was becoming hostile.

FINDINGS AND ANALYSIS

Respondent stands charged herein with engaging in conduct prejudicial to the good order, efficiency and discipline of the Department, to wit: while Gordon was on the ground in handcuffs, Respondent approached him and kicked him in the head.

Respondent is found Guilty. Gordon was found to be a credible witness. He saw an unmarked black car with tinted windows that were rolled up, moving slowly toward him and his friends and he took off running. He explained that he was in East New York, Brooklyn that Friday night with cousins and some friends and that was not where he lived. He stated he did not wait to hear what would happen next and no one identified themselves so he took off running because he knew of drive-by shootings. His testimony was consistent with the medical records in evidence which note that his residence was [REDACTED] in [REDACTED], not East New York. It was also consistent with the testimony of Respondent who noted that he was in plainclothes in a black Mercury Marquis with tinted windows on the incident date. Although Respondent noted that his windows were rolled down, they probably were not before Gordon took off running.

This case turns on the credibility of the witnesses. Gordon survived cross-examination without being impeached. He was consistent and stuck to his direct testimony. He stated on direct and cross-examination that he began running at Sutter and Van Siclen avenues and ended up at Schenck and Blake avenues. Although Respondent's attorney tried to get Gordon to admit he ran and made lefts and ended up right back where he started, Gordon denied this and that assessment was not consistent with the evidence. Respondent testified that he chased Gordon five blocks half a block, a full block, three blocks east and one block north. That is not a circle. Terepka testified that he believed he stopped the suspect who was with Gordon at Sutter and Schenck, and Schenck is where Gordon testified that he stopped running.

Gordon had a civil suit in which he received a settlement. He could have opted not to show up at this administrative hearing, but he did report to testify against

Respondent and state that it was the second officer who approached him who kicked him in the back of the head. Both Santana and Respondent testified that Respondent came over to help Santana get the other handcuff on Gordon. Terepka also testified that the first time he saw Respondent was after Gordon got up from the ground with Santana. Terepka did note that his view of what happened among Santana, Gordon and Respondent was obstructed by parked cars because he was on the other side of the street.

Gordon is a high school student who does community service work helping elementary school students after school with their homework. Although a high school student, he did not embellish when he testified. He said it was the second officer who kicked him once in the head, which caused him to feel dizzy. After his release from police custody, he was taken immediately to the hospital by his mother. He did not state that he was punched, slapped and kicked repeatedly. He also said he was thrown to the ground when handcuffed and his body ached. Gordon further stated that he did have some trouble speaking and people may have thought he was retarded. This account was consistent with the medical records (DX 1). Gordon was treated for tenderness to the base of his head. He was given [REDACTED], a prescription dose. It was also noted that he had slurred speech at the [REDACTED] Hospital Center where he was treated. Although a CAT scan was performed on Gordon and found to be negative, it must be noted that the Respondent testified that he was wearing black sneakers on the incident date, so one kick to the base of Gordon's head may not cause extensive injury other than the tenderness which was diagnosed. Gordon was given paperwork at the [REDACTED] Hospital Center on how to treat a head injury. It is unlikely that he would have been given such treatment material if he was found to be absolutely fine.

While Gordon was found to be a credible witness, such cannot be said of all the witnesses who testified at this proceeding. Santana, for example, testified that he chased Gordon, who in turn pulled a clear Ziploc bag from his pocket and tossed it to the ground while he chased him. However, his partner Terepka testified that he and Santana were in an Anticrime vehicle when they received a radio transmission about a pursuit of a suspect. He and Santana then observed two males running in their direction. Terepka testified that he stopped the suspect on his left and Santana stopped the suspect on his right. He noted Santana ended up on the other side of the street from him with Gordon and he estimated their distance from him was about 15 yards. Thus if Terepka's account is to be believed, there was no chase of Gordon by Santana. Had there been one, I am sure Terepka being the operator of the car would have pursued by car.

Santana then testified that he had no recollection of transporting Gordon to the station house (see Tr. p. 81, lines 11-14). Yet he later testified that he presented Gordon to the desk officer and said Gordon was "apparently normal." This is also inconsistent with the trial testimony of Respondent who said during the so-called chase of Gordon by Santana, Santana lost his gun magazine and he stayed back with him to canvass the area to look for it so they did not transport Gordon to the station house. Thus Santana could not have presented Gordon to the desk officer. I found Santana's testimony not worthy of belief.

There are also inconsistencies in the Respondent's testimony. He stated that he chased Gordon who had a plastic bag and once Gordon turned the corner, he tossed the bag to persons who were sitting on a stoop. This testimony is incredible. How would Gordon know that at 11:30 p.m. while being chased on foot by an undercover police

officer, he would see people on a stoop who would catch a bag he tossed at them? This story is incredible and not worthy of belief. In addition, it is conflicted with Santana's account that Gordon dropped a Ziploc bag of marijuana as he chased him.

What seems to have occurred was a foot pursuit of Gordon by Respondent. Respondent testified that he chased Gordon about five blocks and was tired. Respondent was 42 years of age at the time, whereas Gordon was 16. Respondent admitted that Gordon out ran him. Although Respondent admitted he was tired, he would not admit that he was frustrated, but Gordon testified that while he was on the ground rear cuffed, Respondent gave him one kick to the back of his head just as he turned his head. Respondent gave testimony that he thought Gordon had a firearm and explained that when people take off like that they know why the police are in the neighborhood. Yet, during cross-examination, he stated that Gordon was not being investigated for a violent crime—only the open alcohol container—yet gun possession is a violent crime.

Gordon also testified that his back hurt because as Respondent handcuffed him, he had his knee on his back. Respondent testified that he is six feet tall and he knelt on the ground next to Gordon to handcuff him, yet the testimony was that Gordon resisted arrest the entire time and Terepka heard Santana tell Gordon to stop resisting. It is conceivable that Respondent had to hold Gordon down with his knee to get the second handcuff on him. The Court did not find that Respondent was candid as he testified.

Based on the inconsistencies in not only Respondent's account but Santana's account, I find Respondent Guilty.

PENALTY

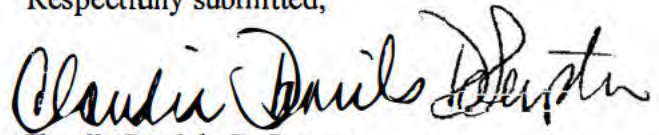
In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974).

Respondent was appointed to the Department on July 18, 1996. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

Respondent has been found Guilty of approaching Gordon who was on the ground in handcuffs and kicking him once in the back of the head. The Assistant Department Advocate asked for a penalty of the forfeiture of 15 vacation days. I agree. Respondent was not forthright as he testified before this Court. In addition, medical records support tenderness to the base of Gordon's head when he sought medical treatment following his release from police custody.

Accordingly, I recommend that Respondent forfeit 15 vacation days.

Respectfully submitted,



Claudia Daniels-DePeyster

Assistant Deputy Commissioner – Trials

APPROVED
OCT 05 2010

RAYMOND W. KELLY
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

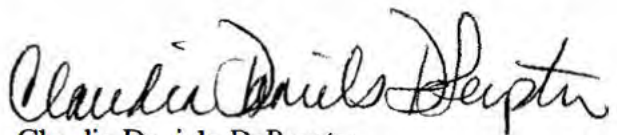
From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER RAYMOND FUSCALDO
TAX REGISTRY NO. 917649
DISCIPLINARY CASE NO. 85820/09

In 2008 and 2007, Respondent received an overall rating of 4.5 “Above Highly Competent” on his annual performance evaluations. In 2006, he received a rating of 4.0 “Highly Competent.” Respondent received four Meritorious Police Duty Medals and nine Excellent Police Duty Medals in his career.

[REDACTED]
[REDACTED] On May 5, 2009 through the present, Respondent has been placed in Level 1 Force Monitoring for having three or more Civilian Complaint Review Board (CCRB) complaints in one year.

Respondent has no prior formal disciplinary record.

For your consideration.


Claudia Daniels-DePeyster
Assistant Deputy Commissioner Trials